

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JARVIS TOUSSAINT,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

No. C 13-4895 CW  
CR 12-0407 CW

ORDER DENYING 28  
U.S.C. § 2255  
MOTION AND DENYING  
REQUEST FOR  
SENTENCING  
TRANSCRIPTS  
(Docket Nos. 169  
and 170)

Movant Jarvis Toussaint, a federal prisoner currently incarcerated at the United States Penitentiary in Atwater, California, filed this motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. For the reasons stated below, the Court DENIES the motion.

BACKGROUND

The motion and the case record show the following facts. On December 3, 2012, Movant plead guilty to one count of conspiracy to commit robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a), and possessing a firearm in furtherance of a crime of violence and drug trafficking crime in violation of 18 U.S.C. § 924(c). The charges were based on Movant's agreement to work with an individual, who turned out to be an undercover agent, to obtain firearms and assist in the robbery of a stash house that



1 was likely to have as many as fifteen kilograms of cocaine inside.  
2 There was no stash house nor was there any cocaine. Movant's plea  
3 agreement included a waiver of his right to appeal or to file any  
4 collateral attack on his conviction or sentence, except that  
5 Movant reserved the right to argue to attack his conviction or  
6 sentence collaterally on the basis of ineffective assistance of  
7 counsel.

8 Movant now argues that counsel was ineffective on three  
9 grounds. First, Movant argues that counsel's performance was  
10 deficient because he advised Movant to accept a plea agreement  
11 that included a waiver of his right to appeal or collaterally  
12 attack his conviction and sentence. Next, Movant asserts that  
13 counsel's performance was deficient because he failed to argue at  
14 sentencing "that Petitioner's crime was manipulated by the  
15 undercover agent in order for Petitioner to receive a mandatory  
16 minimum sentence." Motion at 8. Finally, Movant argues that  
17 counsel's performance was deficient because he advised Movant to  
18 plead guilty to 18 U.S.C. § 924(c), which Movant asserts creates  
19 two separate offenses.

#### 20 LEGAL STANDARD

21 Title 28 U.S.C. § 2255(b) provides that, if a "motion and the  
22 files and the records of the case conclusively show that the  
23 prisoner is entitled to no relief," the Court may dismiss the  
24 motion without seeking a response from the United States Attorney.

#### 25 DISCUSSION

26 A claim of ineffective assistance of counsel is cognizable as  
27 a claim of denial of the Sixth Amendment right to counsel, which  
28 guarantees not only assistance, but effective assistance of



1 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The  
2 benchmark for judging any claim of ineffectiveness must be whether  
3 counsel's conduct so undermined the proper functioning of the  
4 adversarial process that the trial cannot be relied upon as having  
5 produced a just result. Id.

6 To prevail under Strickland, a movant must pass a two-prong  
7 test. First, the movant must show that counsel's performance was  
8 deficient in a way that falls below an objectively reasonable  
9 standard. Id. at 687-88. Judicial scrutiny of counsel's  
10 performance must be highly deferential, and a court must indulge a  
11 strong presumption that counsel's conduct falls within the wide  
12 range of reasonable professional assistance. Id. at 689; see also  
13 Wildman v. Johnson, 261 F.3d 832, 838 (9th Cir. 2001).

14 Second, the movant must show that such deficiency prejudiced  
15 him, which requires a showing that counsel's unprofessional errors  
16 were so serious that, but for these errors, there is a reasonable  
17 probability that the result of the proceeding would have been  
18 different. Strickland, 466 U.S. at 694. A reasonable probability  
19 is a probability sufficient to undermine confidence in the  
20 outcome. Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000)  
21 (citing Strickland, 466 U.S. at 687). It is unnecessary for a  
22 federal court considering an ineffective assistance of counsel  
23 claim to address the prejudice prong of the Strickland test if the  
24 movant cannot establish incompetence under the first prong.  
25 Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998).

26 Movant has failed to establish either deficient performance  
27 or prejudice. The basis of Movant's first claim is that it was  
28 unreasonable for counsel to advise him to plead guilty instead of



1 pursuing an entrapment defense at trial or sentencing. Movant  
2 further argues that counsel failed to advise him that "he could  
3 have plead guilty, challenged his sentence and still kept his  
4 rights to file post-conviction motions." Motion at 5. Movant  
5 provides no evidence that the government would have accepted a  
6 plea agreement in which Movant did not waive his right to appeal  
7 and collaterally attack his conviction or sentence. The Court's  
8 experience is to the contrary. Movant has not shown that  
9 counsel's advice fell below an objectively reasonable standard.

10 Moreover, even if Movant could demonstrate deficient  
11 performance on the part of his attorney, Movant cannot demonstrate  
12 prejudice. Movant argues that he was prejudiced by counsel's  
13 advice because, absent that advice, he "would have been able to  
14 challenge at the sentencing hearing or in a federal habeas motion  
15 that his sentence was manipulated by the undercover agent's  
16 actions." Motion at 6-7. However, counsel did argue at  
17 sentencing that Movant's sentence was manipulated by the agent's  
18 actions. For example, counsel objected to application of points  
19 under the United States Sentencing Guidelines "to take into  
20 account the estimated street value of some arbitrary number of  
21 kilograms of cocaine based upon the conversations that occurred  
22 between the [undercover agent] and the defendants in this case."  
23 Sentencing Memorandum, Docket No. 110 at 8. Counsel further  
24 argued that the Court should impose a sentence below the range  
25 recommended by the United States Sentencing Guidelines because  
26 Movant's "conviction is the result of a sting operation in which  
27 an undercover ATF agent introduced the idea of robbing a fictional  
28 stash house. There were no drugs and there was no risk that any



1 robbery would ever occur since it was all made-up by the agent."  
2 Id. at 14.

3 Not only did counsel argue that the sentence should reflect  
4 the nature of the offense, but the Court sentenced Movant below  
5 the United States Sentencing Guidelines range. The government  
6 argued that the correct Guidelines range was 101 to 123 months in  
7 custody and requested a sentence of 120 months. Counsel for  
8 Movant argued that the correct Guidelines range was ninety to  
9 ninety-seven months in custody and requested a sentence of ninety  
10 months in custody. The Court sentenced Movant to ninety-seven  
11 months in custody. Even if counsel's performance was deficient,  
12 Movant has not established that he was prejudiced.

13 Movant's second assertion of ineffective assistance is that  
14 counsel's performance was deficient because he "fail[ed] to assert  
15 at sentencing, for mitigation purposes, that Petitioner's crime  
16 was manipulated by the undercover agent in order for Petitioner to  
17 receive a mandatory minimum sentence." Motion at 8. However, as  
18 discussed above, counsel made such arguments.

19 Finally, Movant argues that counsel should not have advised  
20 him to plead guilty to 18 U.S.C. § 924(c) because, in doing so,  
21 Movant plead guilty to different offenses in one count. However,  
22 the Ninth Circuit has held that the statutory language in § 924(c)  
23 "names two distinct acts, [but] it does not create two separate  
24 offenses." United States v. Arreola, 467 F.3d 1153, 1158 (9th  
25 Cir. 2006). Accordingly, Movant has failed to demonstrate that  
26 counsel's advice fell below an objectively reasonable standard in  
27 this regard or, even if counsel's advice was deficient, that  
28 Movant was prejudiced.



CONCLUSION

For the foregoing reasons, the Court finds that the motion and the case record conclusively show that Movant is not entitled to relief. Accordingly, the Court DENIES the motion. Docket No. 170. Movant has also filed a request for a copy of the sentencing transcript in his case. However, he has not provided any reason that the Court should provide a copy of the transcript or why the usual ordering procedures and fees should be waived. Accordingly, the Court DENIES the request. Docket No. 169.

IT IS SO ORDERED.

Dated: 12/2/2013

  
CLAUDIA WILKEN  
United States District Judge